UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

In the
United States Court of Appeals
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued November 30, 1995
Decided August 9, 1996

Before
Honorable WILLIAM J. BAUER, *Circuit Judge*
Honorable ILANA DIAMOND ROVNER, *Circuit Judge*
Honorable TERENCE T. EVANS, *Circuit Judge*

No. 95-2573

SHARON L. WRIGHT,	)
	) Appeal from the
Plaintiff-Appellant,	) United States
	) District Court
vs.	) for the Southern
	) District of
PAMELA CARTER, individually	) Indiana
and in her official capacity as	)
Attorney General of Indiana, et al.	) 94 C 1312
	)
Defendantts-Appellees.	) Larry J.
	) McKinney,
	) *Judge*

ORDER

Sharon L. Wright's brief tenure as a Deputy Attorney General for the State of Indiana came to an end early in 1993 following the election of a Democrat, Pamela Carter, as Attorney General. Wright contends that her termination was the result of Carter's desire to bring younger, Democratic attorneys onto the Attorney General's staff. (Wright had been hired by Carter's Republican predecessor and was fifty years old at the time of her discharge.) She filed suit pursuant to 42 U.S.C. § 1983 and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, contending that she had been unlawfully discharged on the basis of her perceived political affiliation and her age. In a brief order incorporating its prior order in *Americanos v. Carter*, No. 94 C 0040 (S.D. Ind. Dec. 13, 1994), the district court dismissed Wright's suit pursuant to Fed. R. Civ. P. 12(b)(6), concluding that the duties and powers associated with the position of Deputy Assistant Attorney general rendered that position exempt from the constitutional prohibition of politically motivated discharge and exempt from the provisions of the ADEA.

On appeal, Wright presents two issues: (1) whether the district court was correct in concluding, as a matter of law, that all attorneys employed by the Indiana Attorney General as deputy attorneys general are exempt from the federal constitutional prohibition against politically motivated discharge; and (2) whether the district court was correct in concluding, as a matter of law, that no attorney emloyed by the Indiana Attorney General as a deputy attorney general qualified as an "employee" within the scope of the ADEA, 29 U.S.C. § 630(f). We recently answered both of these questions in the affirmative in *Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S.Ct. 1853 (1996), in which we

sustained the order of dismissal that the district court relied on here.

For the reasons stated in our opinion in *Americanos*, the judgment of the district court is therefore AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SHARON L. WRIGHT,	)
	)
Plaintiff,	) CAUSE NO.
	) IP94-1312-C-
	) M/S
V.	)
	)
PAMELA CARTER, Individually and in her official capacity as Attorney General of the State of Indiana, DAVID F.HAMILTON, JANICE E. KREUSCHER, DENNIS P. LEE, and MATTHEW R.GUTWEIN, individually and personally liable,	)
	)
Defendants.	)

ORDER

This cause now pends before the Court on defendants' motion to dismiss. Plaintiff Sharon L. Wright ("Wright") was appointed to the position of Deputy Attorney General by Republican Attorney General Linley E. Pearson. In 1992, defendant Pamela Carter was elected Attorney General on the Democrat ticket and subsequently discharged Wright. Wright alleges two federal claims against the defendants, a political firing claim under 42 U.S.C. § 1983, and an age discrimination claim under the Age Discrimination in Employment Act.

The Court has recently dealt with a case involving identical claims, entitled Peter C. Americanos v. Pamela Carter, Cause Number IP 94-0040-C. The Court in its decision outlined the reasons why these claims are not sustainable by holders of the office of Deputy Attorney General in the State of Indiana. The Court now **GRANTS** defendants' motion to dismiss in this case for all the reasons outlined in IP 94-0040-C, which is attached herto and made a part hereof.

There remain in this case several state law claims. Pursuant to 28 U.S.C. § 1367(c)(3), the Court declines to exercise jurisdiction over these state law claims, the federal claims having been resolved.

DATED this 11 day of May, 1995.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PETER C. AMERICANOS,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO.
	)	IP 94-0040 C
PAMELA CARTER, in her personal capacity and in her official capacity as the Attorney General of Indiana; DENNIS P. LEE, in his personal capacity and in his official capacity as Chief of Staff of the Attorney General of Indiana; DAVID HAMILTON, in his personal capacity, and THE STATE OF INDIANA,	)	
	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Peter Americanos ("Americanos") was appointed to the position of deputy attorney general by Republican Attorney General Theodore Sendak in the early seventies. Americanos is a Republican. Sendak was succeeded by a two-term Repblican. Americanos was reappointed both times. In 1992, Defendant Pamela Carter ("Carter") was elected Attorney General on the Democrat ticket and Americanos lost his job.

The complaint has three counts. Americanos alleges in Count 1, brought under 42 U.S.C. § 1983, that

Carter and members of her staff conspired to fire him because of his affiliation with the Republican party. He alleges that he was told that his resignation was requested "after it was determined that [his] contribution to the operations of the office [did] not fit the expectations of the current Attorney General." Americanos submitted his resignation "under protest." He alleges that the explanation he received for the demand of his resignation was a pretext and that he was constructively fired for being a Republican. He further alleges race, gender, national origin and age discrimination in Counts 2 and 3.

Defendants deny any unlawful motive in the request for Plaintiff's resignation. For the purposes of this motion to dismiss, however, Defendants assert that Plaintiff's position as deputy attorney general is exempt from the constitutional prohibition against dismissal based on political affiliation and that Plaintiff's position is not covered by Title VII or the ADEA. The Court for purposes of this entry assumes that Plaintiff's allegation that he wsa fired for his political affiliation is true.

The parties agree that the crucial question that must be answered for the resolution of Count 1 is hwether Plaintiff held a position of a confidential or policymaking nature. The case of Tomczak v. City of Chicago, 765 F.2d 633, 641 (7th Cir.), cert. denied, 474 U.S. 946 (1985), focuses this Court's inquiry on the functions of the office involved rather than the actual functioning of the officeholder. This approach makes sense else an employee holding a position of a confidential policymaking nature and performing in an inefficient or insubordinate fashion could by his or her very inadequacy become a merit employee.

The function of the office of attorney general and the deputies appointed by the attorney general is strictly statutory. The attorney general and her deputies can perform no function for the state other than those specifically delineated by statute. I.C. § 4-6-1-6. The function of the depouty attorney general is essentially the same as the attorney general. The attorney general is authorized to appoint deputies "as he may deem necessary to promptly and efficiently perform the duties of his office . . ." I.C. § 4-6-1-4. Further, the attorney general is authorized "to assign any deputy so appointed to any agency of the state of Indiana to perform in behalf of such agency and the state any and all of the rights, powers or duties now or hereafter conferred by law or laws upon the attorney general . . ." I.C. § 4-6-5-1.

The duties of the attorney general are specifically listed in the statutes. These duties include prosecuting and defending suits by or against the state and state officers, defending suits against state governmental officials or employees or teachers, advising state officials through opinions, advising state agencies, collecting outstanding debts owed to the state, and filing various reports. All these duties are delegable to the deputies.

An attorney-client relationship exists between the deputy attorney general and the state client he or she represents. That confidential relationship between lawyer and client of necessity puts the lawyer involved in a policymaking situation. When clients ask for legal advise, and, as is often the case, the law admits of more than one interpretation, the reply given will influence state policy. Thus, the position of deputy attorney general is involved directly by statute and indirectly considering the attorney-client privilege with "meaningful input into governmental

decisionmaking on issues where there is room for principled disagremeent on goals or their implementation." See Tomczak, 765 F.2d at 641; Selch v. Letts, 5 F.3d 1040, 1043 (7th Cir. 1993), cert. denied, 114 S.Ct. 1189 (1994). Furthermore, because it is impossible to monitor all the activities of the deputies, an opposition party loyalist in the position of deputy attorney general could reasonably serve to threaten the policy objectives of the attorney general. See Selch, 5 F.3d at 1044.

True, individual deputy attorneys general may not make policy in the sens of meeting with the boss regularly to map political or personnel strategy. But the depouty attorney general performing his or her attorney function is of necessity involved in governmental decisionmaking. Whether the depouty is representing a state board at a meeting of the board, or adivsing that board in writing on an issue of procedure or substance, or advising a state official on a legal issue in an official or unofficial opinion, or representing the interests of the state in a lawsuit either as plaintiff or defendant, a deputy attorney general is vested with the same authority as the attorney general herself. The deputy is the public representative of the office. The very nature of the authority vested in the position requires the making of decisions and the exercising of judgment that amounts to the making of policy.

A recent Seventh Circuit case, Kolman v. Sheahan, 31 F.2d 429, 431-34 (7th Cir. 1994), which denied a motion to dismiss a political firing claim, is distinguishable, In that case, the court stressed that the record was silent regarding the nature of the positions at issue. The positions were within an obscure department in county government and could well have been

inconsequential or meaningless with respect to policymaking. The court simply had no idea. See id. at 432. In this case, the inherent powers of the depouty attorney general are found in the statutes. The deputy attorney general has the same power and authority as the attorney general.

The Court finds that the position described by statute as deputy attorney general carries with it inherently the responsibility to have meaningful input into governmental decisionmaking on issues where there is room for principled disagreement on goals or their implementation. The statutory conferral to the attorney general of the right to remove deputies at any time, see I.C. § 4-6-5-1, reflects this expectation, as does the fact that deputies' terms expire at the same time as the appointing attorney general's term, see Hord v. State, 79 N.E. 916, 921-22 (Ind. 1907); see also Roberts v. State ex rel. Jackson Co. Bd. of Com'rs, 278 N.E.2d 285, 290 (Ind. Ct. App. 1972), as does the fact that deputies are exempt from the state's civil service laws. See I.C. § 4-15-2-3.8.

For all the above reasons, the Court concludes that the position of deputy attorney general is exempt from the constitutional prohibition of politically motivated firing. Absent that prohibition, Americanos could be fired for his political affiliation. See Selch, 5 F.3d at 1047. Count 1 is DISMISSED WITH PREJUDICE.

Count's [sic] 2 and 3 fail for the same reasons. See Heck v. City of Freeport, 985 F.2d 305, 310 (7th Cir. 1993). Both the ADEA and Title VII contain the following exemption:

> [T]he term "employee" shall not include any person selected to public office in any State or political subdivision of any State by the qalified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with rspect to the exercise of the constitutional or legal powers of the office. The exemption set forth i the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or politicla subdivision.

29 U.S.C. § 630(f); 42 U.S.C. § 2000e(f). The position of deputy attorney general falls within the exemption. Each attorney who serves on the attorney general's staff as her deputy, by the inherent nature of the position, is an employee on the policymaking level and an immediate advisor to the attorney general with respect to the constitutional or legal powers of the office. Again, the fact that a particular deputy attorney general may not be asked to provide the kind of advice or service that another might by [sic] asked to provide is not controlling. The nature of the position, not the actual performance in that position, is what controls.

Plaintiff cites Rabouin v. Colorado Department of Law, 754 F.Supp. 171, 173-74 (D. Colo. 1990), in which a motion to dismiss the Title VII claim of a Colorado assistant attorney general was denied. The court was concerned that the plaintiff was the most junior attorney in the office and had no policymaking authority. The court, however, did not look to any statutes defining the powers or duties of the attorney general or assistants.

Defendants counter Rabouin with more persuasive authorities, including Monce v. City of San Diego, 895 F.2d 560 (9th Cir. 1990). In Monce, the city successfully moved to dismiss

an age discrimination claim filed by a deputy city attorney. The plaintiff was a trial deputy, one of the lowest positions in the office, with little individual authority. Looking to stattes like those applicable here, the Ninth Circuit concluded that the position was subject to the personal staff exemption. The Court reasoned:

> Although Monce did not have an immediate personal relationship with the City Attorney and was not personally entrusted with a great deal of responsibility, as a deputy city attorney he was placed in the public eye as a representative of the City Attorney's Office and was empowered to exercise the legal authority of that office.

Id. at 561.

For all the above reasons, the Court concludes that Americanos has fialed to state a claim under either the ADEA or Title VII. Counts 2 and 3 are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 13 day of December, 1994.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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